

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-2285

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
TOBIA SPINA,

Relator-Appellant,

-against-

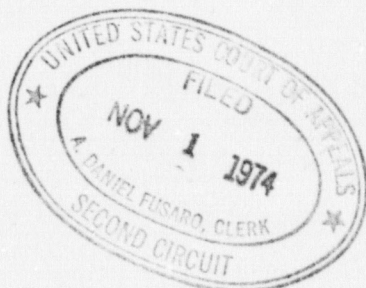
ADAM McQUILLAN, Warden,

Respondent-Appellee.

Docket No. 74-2285

BRIEF FOR RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Relator-
Appellant TOBIA SPINA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel

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Docket No. 74-2885

BRIEF FOR RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the District Court erred in resolving the disputed issues of fact against petitioner without allowing him to present evidence of his claims at a hearing.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Charles H. Tenney) rendered November 5, 1973, denying relator-appellant Spina's petition for a writ of habeas corpus. On December 17, 1973, the District Court denied Spina's request for a certificate of probable cause, but granted him leave to appeal in forma pauperis. This Court, on September 17, 1974, granted a certificate of probable cause, and assigned the Federal Defender Services Unit of The Legal Aid Society as counsel on the appeal.

Statement of Facts

A. Undisputed Facts

On November 19, 1969, relator-appellant Spina, a detective for the New York City Police Department, and one Watkins T. Perry, were indicted for two misdemeanors: conspiracy in the fourth degree, and receiving unlawful gratuities. The trial on this indictment did not commence until January 6, 1972, some twenty-six months later. The State finally moved the case to trial on this latter date in the midst of the Knapp

Commission hearings, when evidence of police corruption in the process of being uncovered by the Commission was receiving widespread media coverage.

On January 6, 1972, prior to the commencement of trial, Spina moved for the trial court to dismiss the indictment, on the ground that his constitutional right to a speedy trial had been violated by the lengthy delay in this case (A.40 et seq.*). The court denied the motion without a hearing and without making any findings (A.64). Spina was subsequently convicted by a jury of both counts of the indictment and was sentenced to three months' incarceration on count one, and incarceration for one year on count two, the sentences to run concurrently.

On appeal, Spina's conviction was affirmed by the Appellate Division, First Department, without opinion. 41 A.D.2d 602 (1973). On February 18, 1973, leave to appeal to the New York Court of Appeals was denied.

Spina commenced service of his sentence on March 29, 1973, at the Queens County House of Detention. On June 21, 1973, while so incarcerated, he filed with the United States District Court for the Southern District of New York the petition whose denial is the subject of the present appeal.

The District Court denied the petition without a hearing on November 5, 1973. Spina has subsequently completed service

*Numerals in parentheses refer to pages of the transcript of the trial.

of his sentence.

B. Allegations in the Petition

Spina claimed in his petition that during the twenty-six month period between his indictment and trial his case was adjourned approximately thirty times and that most of these adjournments were at the request of the District Attorney (Petition at 2-3), and not of Spina (Supplemental Petition at 3.)* On several occasions during this period, Spina demanded that his trial begin (petition at 3; see also Affidavit in Support of Motions for Dismissal at 3-5). Spina also claimed that the District Attorney manipulated the trial calendar with the result that his case was not brought to trial until the final week of the Knapp Commission hearings (Petition at 3; see also Affidavit in Support of Motions for Dismissal at 5). Spina asserts in his petition and in the motion to dismiss made by his attorney prior to trial that he was prejudiced by the long delay in his trial in that certain witnesses** became unavailable to testify; that he suffered "loss of gainful

*Spina also stated that the sentencing court failed to comply with his numerous requests for the transcripts of the adjournment proceedings (Petition at 3).

**These witnesses included Victor Recchia, the informant to the Police Department, who Spina claimed was the actual intended recipient of the money Spina was accused of taking as a bribe; and Michael Gobieski, Robert Waganer, and Edward Burban, employees or otherwise connected with the company which was allegedly pressured to pay the bribe.

employment;" that he was twice denied employment in high paying positions because he was ineligible for bonding while the trial was pending; that he was forced deeply into debt and suffered a broken marriage, "health impairment and inestimable mental anguish and public scorn upon himself and his family" (Supplemental Petition at 2-3).

C. Allegations in the Respondent's Papers

The State responded to petitioner's claims by merely referring the court to the respondent's brief to the Appellate Division in the state appeal of Spina's conviction. In that brief, the State claimed that all of the adjournments of the trial, other than those attributable to court congestion, were either caused or consented to by Spina and his co-defendant's counsel (Respondent's Brief at 47). Respondent based this claim solely on the statements made by an Assistant District Attorney during the colloquy concerning Spina's pre-trial motion to dismiss the indictment. Those statements were unsworn, not subject to cross-examination, and concededly hearsay, being based solely on the notations made by other Assistant District Attorneys on the prosecutor's trial folder.

D. The District Court's Findings

The District Court, in denying Spina's petition, refused to hold a hearing but instead proceeded to resolve the disputed

issues of fact solely on the basis of the papers filed by the petitioner and respondent. In so doing, the District Court rejected petitioner's claims that the State was responsible for most of the delay in his trial and that petitioner and his counsel had, on several occasions during the twenty-six month period, demanded that the trial begin. Rather, the District Court chose to credit respondent's claims, holding that:

Until the commencement of the trial, petitioner's counsel made no demand for trial. Indeed, the numerous delays were either caused by petitioner's and/or Parry's counsel or were consented to by them.

District Court Opinion at 2.

The District Court also chose to disbelieve petitioner's numerous claims of prejudice arising from the delay in trial, including the unavailability of witnesses, Spina's loss of a job, his inability to get bonded or find employment, his falling into debt, and his resultant family and health problems, and concluded instead that "petitioner apparently suffered no prejudice" (District Court Opinion at 3).

ARGUMENT

THE DISTRICT COURT ERRED IN RESOLVING THE DISPUTED ISSUES OF FACT AGAINST PETITIONER WITHOUT ALLOWING HIM TO PRESENT EVIDENCE OF HIS CLAIMS AT A HEARING.

Spina's petition for a writ of habeas corpus sets forth claims which, if true, establish a violation of his Sixth Amendment right to a speedy trial. The State has disputed several of these claims, namely that the prosecutor was responsible for most of the delay in Spina's trial, that Spina and his counsel on several occasions before trial demanded a speedy trial, and that Spina was prejudiced by the delay. The state courts failed to hold a hearing or render any findings on these disputed facts. Consequently, the District Court clearly erred in resolving these disputed issues of fact against petitioner without allowing him to present evidence of his claims at a hearing.

A. Spina's claims establish a prima facie
Sixth Amendment violation.

Barker v. Wingo, 407 U.S. 514 (1972), identifies four factors to be considered by the court in determining whether a defendant's constitutional speedy trial rights have been violated. The first factor, the length of the delay, is, according to the Supreme Court, the "triggering mechanism."

If the length of the delay is substantial, the district court is obliged to make inquiry into the existence and substantiality of the other three criteria. Id., at 530. In Strunk v. United States, 412 U.S. 434 (1973), a delay of nine months was held to be sufficiently substantial to trigger this further inquiry. Clearly, therefore, the twenty-six months' delay between indictment and trial in the present case mandates further investigation into whether a Sixth Amendment violation has occurred. The District Court acknowledged this by holding:

The twenty-six month delay raises the threshold question of whether petitioner was denied his right to a speedy trial.

District Court Opinion,
at 2.

In making further inquiry, the district court is required, under Barker v. Wingo, supra, to consider three other factors: the reason for the delay, the defendant's assertion of his speedy trial right, and the prejudice arising from the delay. The Supreme Court stressed that no one of these factors was, in itself, necessary to a finding that the right to a speedy trial has been denied. Barker v. Wingo, supra, 407 U.S. at 533. In Moore v. Arizona, 414 U.S. 25 (1973), for example, the Supreme Court held that the district court had erred in ruling that a showing of prejudice was necessary to establish a speedy trial claim. In the present proceeding, however, in addition to the substantial length of the delay, Spina's

petition contained allegations supporting his claim of speedy trial violation under all three of the other criteria.

The petition asserts that the prosecutor, and not Spina, was responsible for virtually all of the twenty-six month delay. Even if only part of this lengthy delay were attributable to the State, however, that fact would provide strong support for Spina's claim of speedy trial violation.

The petition further asserts that the prosecutor deliberately caused the delay in order to bring this police bribery case to trial in the midst of the sensational publicity surrounding the Knapp Commission hearings. Given the lengthy delay and the fact that Spina's trial did finally occur during the final week of the Knapp Commission hearings, the District Court would have been justified in imputing such intent to the prosecutor if it found that the prosecutor was, in fact, responsible for a substantial portion of the delay. Proof that the prosecutor intentionally delayed the proceedings would weigh heavily in support of Spina's claim of Sixth Amendment violation. Barker v. Wingo, supra, 407 U.S. at 531.

However, even if the prosecutor's culpability for delay arose merely from negligence, his responsibility for the delay would lend support to the claim of Sixth Amendment violation

... since the ultimate responsibility for such circumstances must rest with the Government rather than the defendant.

Barker v. Wingo, supra,
407 U.S. at 531; see also
Strunk v. United States,
supra, 412 U.S. at 436-437.

Spina has also made a prima facie showing in support of his claim of speedy trial violation on the third criterion, whether the defendant asserted his right to a speedy trial or acquiesced in the delay. In addition to the motion to dismiss, made just before trial, Spina also states in his petition that he and his counsel demanded on several prior occasions that he be brought to trial.

Spina's claims going to the fourth criterion, prejudice resulting from the delay, are likewise substantial. Thus, he claimed that four witnesses, critical to his defense, became unavailable because of the delay.* In Barker v. Wingo, supra, 407 U.S. at 532, the Supreme Court held that the fact that a delay has caused witnesses to become unavailable is strong evidence of Sixth Amendment violation. Additionally, Spina claimed that as a result of the twenty-six month delay in his trial he suffered "loss of gainful employment," was twice denied employment in high paying positions because he was not eligible for bonding while the trial was pending, was forced deeply into debt, and suffered a broken marriage, "health impairment and inestimable mental anguish and public scorn upon himself and his family." Such factors are recognized as forms of prejudice to be considered in a speedy trial case. Barker

*These included an informant for the Police Department who was the intended recipient of the money Spina was accused of taking as a bribe and three other persons employed by or associated with the firm alleged to have been pressured into paying the bribe.

v. Wingo, supra, 407 U.S. at 532.

In light of the fact that Spina made substantial claims going to all four of the criteria suggested by the Supreme Court in Barker v. Wingo, supra, he clearly presented a prima facie case of constitutional speedy trial violation.

B. The District Court erred in dismissing
the petition without a hearing.

The State, in both the trial court and the Federal District Court, disputed several of Spina's claims, including his claim that the prosecutor had caused most of the twenty-six month delay, that Spina and his counsel had on several occasions during the twenty-six month period demanded that the trial begin, and that Spina was prejudiced by the delay. However, the State pointed to no testimony or other evidence in the trial record which contradicts Spina's claims.* When Spina's counsel made a motion in the trial court for dismissal because of speedy trial violations, that court failed to hold any hearing or make any findings concerning these disputed facts.

*In its papers before the District Court, the State relied solely on the statements made by an Assistant District Attorney during a colloquy in the trial court concerning Spina's motion to dismiss for speedy trial violation. Those statements were not testimony, but rather argument. They were unsworn, not subject to cross-examination, and concededly hearsay, being based solely on the notations made by other Assistant District Attorneys on the prosecutor's trial folder. Moreover, they were contradicted by Spina's counsel.

The Federal District Court, in considering whether Spina's petition should be dismissed without a hearing, was required to credit his allegations. Cooper v. Pate, 378 U.S. 546 (1964). In the present proceeding, to the contrary the District Court chose to disbelieve Spina's claims and instead credit the unsubstantiated claims contained in the State's papers. Thus, although Spina claimed that he and his counsel had on several occasions during the twenty-six month delay demanded that the trial begin, the District Court held that

... until the commencement of the trial, petitioner's counsel made no demand for trial.

District Court Opinion,
at 2.

Although Spina claimed that the delays were occasioned by the prosecutor and not Spina, the District Court held that:

... the numerous delays were either caused by petitioner's and/or [co-defendant] Parry's counsel or were consented to by them.

Ibid.

Although Spina made numerous claims of prejudice arising from the delay in trial, including the unavailability of witnesses, his loss of a job, his inability to get bonded or find employment, his falling deeply into debt and his resultant family and health problems, the District Court held that:

... petitioner apparently suffered no prejudice.

Id., at 3.

It was clearly erroneous for the District Court to resolve these factual disputes without a hearing solely on the basis of the State's opposing papers. Machibroda v. United States, 368 U.S. 487, 494 (1962); Coleman v. Wilson, 401 F.2d 536, 537 (9th Cir. 1968); Wright v. Dickson, 336 F.2d 878, 882-883 (9th Cir. 1964). Title 18, U.S.C. §2554 plainly requires that where, as here, material facts are not adequately developed and the merits of factual disputes are not resolved at a state court hearing, the Federal District Court was required to give Spina an opportunity to prove his claims. Townsend v. Sain, 372 U.S. 293 (1963). This case must be remanded for such a hearing.

CONCLUSION

For the above-stated reasons, the order of the District Court denying the petition for writ of habeas corpus must be reversed and the case remanded for a hearing.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Relator-
Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

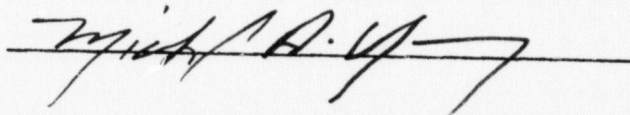
MICHAEL YOUNG,
Of Counsel

November 1, 1974

Certificate of Service

November 1, 1974

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

A handwritten signature in dark ink, appearing to read "Joseph A. V. 7", is written over a horizontal line.